UNITED NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 641

Case No. 714: FARID

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas at the request of Ghulan Farid, a former staff member of the Office of the United Nations High Commissioner for Refugees, hereinafter referred to as UNHCR, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 December 1992, 31 January and 28 February 1993 the time-limit for the filing of an application to the Tribunal;

Whereas, on 26 February 1993, the Applicant filed an application requesting the Tribunal, inter alia:

"...

(9) To order the Respondent:

(a) To ... re-instate him ... retroactive from 26 March 1986 ... pursuant to staff rule 104.3(b).

(b) To pay the Applicant, in lieu of specific performance under item (a) above, three years' net base salary as at the time of his separation from UNHCR, and appropriate indemnity, pursuant to Annex III to the Staff Regulations, as recommended by the JAB [Joint Appeals Board]...

(10) To award him appropriate and adequate compensation for the material and moral injuries suffered by him...

(11) To award him appropriate and adequate compensation for the unreasonable delays in the JAB procedures for over six years..."

Whereas the Respondent filed his answer on 15 April 1994;

Whereas the Applicant filed written observations on 31 May 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNHCR on 20 May 1980, as an Administrative Assistant on a short-term appointment, at the GL-5 level, at the Islamabad Office. He served on a series of short-term and fixed-term appointments until 1 January 1983, when he was granted an indefinite appointment. The Applicant's grade and level were readjusted to GL-7, step III, with retroactive effect from 1 March 1981, when his functional title became Senior Administrative Assistant. The Applicant was dismissed for misconduct under staff rule 110.3(b) in force at the time, with effect from 25 March 1986.

On 25 July 1983, the Chief of Mission at the Islamabad Office informed the Applicant that information had been received that he had been dismissed for misconduct from the British Embassy in 1977. It was noted that he had withheld this fact from UNHCR at the time of his recruitment, that no reference of good service had been given to him by the British Embassy, and that the document he had submitted to UNHCR upon recruitment was "not authentic". Accordingly, he was being suspended from duty with pay, pursuant to staff rule 110.4, pending investigation. The Applicant was asked to give his version of the matter and to contact the Chief or the Deputy Chief of Mission as soon as possible.

In replies dated 28 July and 29 August 1983, the Applicant denied the allegations against him. On 22 August 1983, the Applicant requested the Secretary-General to review the decision to suspend him from duty.

In a cable dated 29 December 1983, the Director of the Division of Personnel Administration at Headquarters asked the Chief of Mission, UNHCR, Islamabad, to inform the Applicant that the decision to suspend him from duty with pay pending disciplinary investigation was correct under staff rule 110.4 and personnel directive PD/1/76. However, it had been determined that the requirements for disciplinary action had not been met. As his case was, therefore, no longer disciplinary, his suspension with pay would cease and he would return to duty, unless the best interests of the Organization required UNHCR to put him on special leave with full pay under staff rule 105.2 pending a further decision.

On 2 January 1984, the Chief of Mission at the Islamabad Office informed the Applicant as follows:

> "I am directed by UNHCR Headquarters to inform you that with immediate effect you have been placed on special leave with full pay under staff rule 105.2, in the best interest of the organization, and pending a final decision on your case."

On 12 January 1984, the Applicant requested the Secretary-General to review the decision placing him on special leave with full pay. On 15 March 1984, the Assistant Secretary-General for Personnel Services informed the Applicant that this decision would be maintained. Meanwhile, on 28 February 1984, the Applicant lodged an appeal with the Joint Appeals Board (JAB) against this decision. The JAB adopted its report on 29 May 1986. Its conclusions and recommendations read, in part, as follows:

> "...
>
> 32. In view of the findings of the Board that Appellant was placed on special leave with pay at variance with the Staff Rules, the Board recommends that the Secretary-General consider the implications of the Board's findings with regard to the subsequent decision affecting Appellant's employment status."

On 30 October 1986, the Assistant Secretary-General for Personnel Services transmitted to the Applicant a copy of the JAB report and informed him as follows:

> "The Secretary-General, having re-examined your case in the light of the Board's report, has decided to take no further action on your appeal.
>
> The Secretary-General's decision is based on the fact that you have already received full pay for more than two years without being required to work, which is more than adequate compensation for a possible misinterpretation by UNHCR of staff rule 105.2(a) on special leave without pay."

In the meantime, on 3 February 1984, the Chief of the Geneva Service of the Internal Audit Division conducted an audit of the administrative activities of the UNHCR Office in Islamabad from 1 January 1982 to 31 August 1983. He also investigated the alleged non-disclosure of prior misconduct and forgery of a reference relating to the Applicant's previous employment with the British Embassy.

As a result of the audit and the investigation, the Head of UNHCR Personnel Services, pursuant to the provisions of Personnel Directive PD/1/76, wrote to the Applicant, on 19 April 1984, reiterating the allegations in connection with his prior employment with the British Embassy. He also informed him of the discovery of financial irregularities and malpractices allegedly committed by the Applicant at the UNHCR Office.

In a reply dated 27 September 1984, the Applicant, inter alia, objected to UNHCR's "re-opening" of the matters concerning his previous employment with the British Embassy. He also objected to not being provided with the complete audit report and other documentation relating to the allegations against him. He denied all the charges.

On 20 May 1985, the Head of UNHCR Personnel Services transmitted to the Applicant, for his comments, the final report of the audit and investigation. The report cited the non-disclosure of prior misconduct and referred to the submission of a forged

reference. It also stated, inter alia, that the Applicant violated UNHCR rules governing cash management, e.g. in connection with payments to suppliers; failed to exercise proper control over the use of UNHCR tax exemption certificates; failed to use adequate competitive bidding procedures for selecting local suppliers; failed to properly maintain records and provide adequate justification for the use and servicing of vehicles; and failed to properly account for spare parts.

On 13 June 1985, the Applicant provided his comments on the report.

On 25 March 1986, the Assistant Secretary-General for Personnel Services at Headquarters informed the Applicant as follows:

> "I regret to inform you that the Secretary-General has decided to dismiss you for misconduct as a disciplinary measure under staff rule 110.3(b).
>
> The Secretary-General's decision was taken upon his finding that you misrepresented facts about your previous employment, mismanaged cash and other assets of the United Nations High Commissioner for Refugees, and failed to ensure the regularity of financial matters entrusted to you. The Secretary-General concluded that you failed to maintain the standards of conduct incumbent upon international civil servants, and that your actions were incompatible with your continued employment.
>
> The dismissal is effective on the date of notice. You will be given compensation in lieu of one month's written notice of termination in accordance with staff rule 109.3(b). The Secretary-General has decided that in view of the serious and continuing nature of the offences, and in view of the length of your absence from duty on full pay, no termination indemnity shall be paid under Annex III, paragraph (c) of the Staff Regulations."

On 5 June 1986, the Applicant lodged an appeal with the JAB against the decision to dismiss him for misconduct. The JAB adopted its report on 9 June 1992. Its considerations and recommendation read, in part, as follows:

"Considerations

22. The Panel held the view that, if it could be proved that the Appellant was involved in mismanagement of UNHCR assets and accounting irregularities, his dismissal would be amply justified. The Panel therefore did not find it necessary to pronounce itself on whether the Administration was also justified in relying upon the allegedly misrepresented facts about the Appellant's previous employment with the British Embassy as an additional ground of dismissal.

...

24. The Panel was of the opinion, however, that such irregularities could not have been committed by the Appellant without a degree of laxity on the part of his supervisors, taking into account the degree of confidence shown towards the Appellant (as indicated by his good evaluations and promotion record). It is noted that whatever was prepared and signed by the Appellant had also been seen and counter-signed by his supervisors. ...

25. The Panel noted that the procedure whereby the Appellant was placed on special leave for an unspecified duration, was irregular, as found in the earlier JAB case ... The correct procedure would have been to suspend the Appellant from service. The Panel also noted that the audit investigation took place at the request of the UNHCR, at a time when the Appellant was on special leave.

...

27. ... The Panel agreed that although the Appellant was on full pay status during his suspension, the undue delay in this case must have caused him significant mental anguish and considered it appropriate that compensation be granted to the Appellant.

...

Recommendation

29. The Panel therefore recommends that a termination indemnity, to be calculated in accordance with the criteria set out in Annex III to the Staff Regulations, be granted to the Appellant.

30. The Panel makes no further recommendation in support of this appeal."

On 13 August 1992, the Assistant-Secretary-General for Human Resources Management informed the Applicant, inter alia, as follows:

> "The Secretary-General has re-examined your case in the light of the Board's report. He agrees with the Board's findings that the applicable procedures had been followed prior to the termination of your appointment for misconduct, and that there was no evidence of prejudice.
>
> However, bearing in mind that:
>
> ...
>
> (vi) Under Annex III(c) to the Staff Regulations, payment of one half of the normal termination indemnity to a staff member who is dismissed for disciplinary reasons is at the discretion of the Secretary-General, who finds it would not be appropriate to make such a payment in your case,
>
> the Secretary-General cannot accept the Board's conclusion that your due process rights were not respected. He must reject the recommendation that you be paid a termination indemnity calculated in accordance with the criteria set out in Annex III to the Staff Regulations.
>
> However, because part of the delays in considering your appeal can be attributed to unsatisfactory aspects of the appeal process, the Secretary-General has decided that you should be paid an amount of $2,000."

On 26 February 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent chose to conduct his investigation under the PD/1/76 procedure rather than through the Joint Disciplinary Committee at the United Nations Office in Geneva, thereby denying the Applicant due process in accordance with Chapter X of the Staff Rules then in force.

2. The Respondent determined that there was no substantial evidence on record to justify disciplinary measures in connection with the Applicant's alleged misconduct in his prior employment with the British Embassy.

3. The penalty of summary dismissal, in the face of gross procedural irregularities under PD/1/76, was far out of proportion to the alleged misconduct, which had never been established by the Respondent under PD/1/76.

4. The Applicant suffered on account of the inordinate delays by the Administration in handling the case.

Whereas the Respondent's principal contentions are:

1. The Secretary-General has broad discretion with regard to disciplinary matters, and this includes determinations of what constitutes misconduct warranting dismissal.

2. The Secretary-General's decision to dismiss the Applicant was a valid exercise of that discretionary authority, and was not vitiated by a mistake of fact, by lack of due process or by prejudice or any other extraneous factors.

The Tribunal, having deliberated from 24 June to 13 July 1994, now pronounces the following judgement:

I. The substantive issue in this case is whether the Applicant's dismissal was proper. Article 101 of the United Nations Charter vests in the Secretary-General the responsibility for appointment of staff members who must meet "the highest standards of efficiency, competence and integrity." In addition, staff regulation 1.4 states:

> "Members of the Secretariat shall conduct themselves at all times in a manner befitting their status as international civil servants. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action ... which may adversely reflect on their status, or on the integrity, independence and impartiality which are required by that status..."

II. Should staff members fail in their obligation to satisfy these standards of conduct, staff regulation 10.2 provides that the Secretary-General may impose disciplinary measures on them. The choice of disciplinary measures, including the right to terminate an appointment, falls within the Secretary-General's discretionary powers. (Cf. Judgement No. 424, Ying (1988); Judgement No. 425, Bruzual (1988) and Judgement No. 429, Beyele (1988)).

III. The Applicant was dismissed principally for his failure to be truthful about his prior employment, supplying an allegedly forged letter of reference, and for committing financial irregularities in the course of his employment.

The Applicant maintains throughout that there was a cover-up concerning the financial irregularities, alleging that other staff members were also involved. His feeling of being singled out for persecution by officials at the UNHCR office in Islamabad was commented upon by the JAB in the following terms:

> "...It is also unfortunate that the Appellant may have been left with the impression that he was chosen to be a scapegoat while others may have escaped scot-free."

IV. Similarly, the Applicant repeatedly states that the UNHCR Administration did not "establish facts on the Applicant's case with absolute certainty". In this context and on the question of the burden of proof in such cases, the Tribunal held in Judgement No. 479, Caine (1990):

> "Respondent is not required to establish beyond any reasonable doubt a patent intent to commit the alleged irregularities, or that the Applicant was solely responsible for them. The Tribunal's review of such cases is limited to determining whether the Secretary-General's action was vitiated by any prejudicial or extraneous factors, by significant procedural irregularity, or by a significant mistake of fact."

V. The Applicant further claims that his case was tainted by procedural irregularity and that he was denied due process by the UNHCR Administration. The Tribunal must determine if the Respondent followed, throughout the case, all the relevant administrative procedures aimed at ensuring fairness and due process.

VI. The Tribunal has examined the record and finds that due process was by and large respected by the Respondent. The findings against the Applicant were fully presented to him, and he was given, and he in fact took, every opportunity to respond to them.

VII. In light of the jurisprudence of the Tribunal, the Applicant must provide satisfactory evidence of prejudice or extraneous factors which may have led the Respondent to dismiss him. The Applicant presented no evidence supporting his allegations of prejudice, and therefore, the Tribunal cannot hold that the Respondent's decision was motivated by prejudice or similar extraneous factors.

VIII. The Tribunal also notes that the Applicant was placed on special leave with full pay pending a decision on his case. As noted by the JAB, the correct procedure would have been to suspend the Applicant from service. However, the Tribunal does not find that the actual procedure followed adversely affected the interests of the Applicant.

IX. Regarding the audit which led to his dismissal, the Applicant claims that he was not present during the investigation and that he did not receive a complete report. The Tribunal holds that, in the circumstances of this case, it was reasonable for the Respondent to decide that an official suspected of financial irregularities should not be present at an audit.

Furthermore, it appears that the audit was an exercise which dealt with the financial transactions of the whole UNHCR office in Islamabad. The Tribunal considers that it would have been improper for the Respondent to provide information to the Applicant that did not concern his case.

X. The Applicant also contends that the delays in the JAB procedures have caused him a "denial of justice". However, as pointed out by the JAB report, as well as by the Applicant himself, any delay was largely due to the fact that the Applicant objected to the initial composition of the JAB panel.

XI. The Applicant denies all allegations made against him, and submits that his dismissal was based on mistaken findings of fact. The Tribunal will not examine the details of all the charges and counter-charges. The Tribunal notes that the Respondent is vested with broad discretionary powers in imposing disciplinary measures and finds that the Applicant's dismissal was based on an examination of facts free from prejudice and bias.

XII. The Tribunal concludes, from the evidence before it, that the Respondent took reasonable care to observe the relevant administrative rules and regulations.

XIII. With regard to the Secretary-General's rejection of the JAB's recommendation to grant the Applicant a termination indemnity, the Tribunal finds that the Secretary-General was within his authority to reject the recommendation, as the JAB's recommendations are purely advisory. (Judgement No. 562, Al-Jaff (1992)).

XIV. Moreover, the Tribunal considers that as the Applicant has already received more than two years of full pay, while on leave, he is not entitled to compensation.

XV. In the light of the foregoing, the application is rejected in its entirety.

(Signatures)

Samar SEN
President

Francis SPAIN
Member

Mayer GABAY
Member

Geneva, 13 July 1994

R. Maria VICIEN MILBURN
Executive Secretary